95-1334

Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

BOBBIE JUNE GRIGGS,

Petitioner,

v.

SOUTH CAROLINA ELECTRIC & GAS COMPANY,

Respondent.

PETER HARVEY GRIGGS,

Petitioner,

v.

SOUTH CAROLINA ELECTRIC & GAS COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Bobbie June Griggs suffered a permanent nervous disorder (for the treatment of which she requires psychiatric counseling and medications) as a direct and proximate result of various actions taken by the Respondent and directed towards her after Respondent had published, without her authorization, a recipe she had submitted to it for use in a contest it had sponsored.

1. Does the Federal Copyright Act of 1976 preempt the South Carolina state claims of outrage (intentional infliction of emotional distress) and negligent infliction of physical injury?

2. Can a single cooking recipe be copyrighted under the Federal Copyright Act of 1976?

PARTIES

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The Opinion of the Supreme Court of South Carolina (October 16, 1995) is reported at ___ S.C. ___, 463 S.E.2d 608 (1995), and is reprinted at App. 1.

The Order of the state trial court Dismissing Petitioner's Complaint for Lack of Jurisdiction (August 8, 1994) is reprinted at App. 8.

The Order of the Supreme Court of South Carolina denying a timely petition for rehearing (November 16, 1995) 15 S.C. ___, 463 S.E.2d 608 (1995), and is reprinted at App. 15.

JURISDICTION

The Opinion of the Supreme Court of South Carolina was dated October 16, 1995 and a timely petition for rehearing was denied on November 16, 1995. This Court's certiorari jurisdiction arises under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

United States Code, Title 17, Section 101 defines

> "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works."

Subsection (b) of the United States Code, Title 17, Section 102

> "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Subsection (a) of the United States Code, Title 17, Section 103

> "The subject matter of copyright as specified by section 102 includes compilations and derivative works . . . ".

Subsections (a), (b)(1) and (b)(3) of the United States Code, Title 17, Section 301

> "(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as expressed by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to –
>
> (1) subject matter that does not come within the subject matter of copyright as

> specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression,
>
> . . .
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106."

United States Code, Title 17, Sections 502 through 505.[1]

Subsection (a) of the United States Code, Title 28, Section 1338

> "The court shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights, and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."

Subsections (a) and (b) of the Code of Federal Regulations, Title 37, Section 202.1

> "The following are examples of works not subject to copyright and applications for registration of such works cannot be entertained:
>
> (a) . . . mere listing of ingredients or contents;
>
> (b) Ideas, plans, methods, systems, or devices, as distinguished from the particular manner in which they are expressed or described in a writing;"

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[1] These sections are reprinted at App. 16.

STATEMENT OF FACTS[2]

In August 1989 Petitioner, Bobbie June Griggs, entered her recipe for a rice dish[3] in Respondent's Third Annual Rice Cookoff. Without providing notice to or obtaining permission from any of the contest participants, Respondent published all of the recipes which had been submitted in a cookbook commemorating the event. When Petitioner, Bobbie June Griggs, learned of this she became upset and demanded that the Respondent remove her recipe from the undistributed copies of the cookbook. Respondent agreed to do so but notwithstanding its assurances, left her recipe in the cookbooks which were subsequently distributed to the public. In an alleged effort to conceal its deception, Respondent mailed one of the copies of the cookbook to her from which the recipe had been removed. When the Petitioner, Bobbie June Griggs, learned of these subsequent acts and deceptions she suffered a nervous breakdown which required that she be placed under the care of a psychiatrist whose prescribed treatment includes her having to take various psychotropic medications.[4]

In August 1992 Petitioner brought this action alleging a claim for negligent infliction of physical injury and

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[2] The following facts are as alleged in Petitioner Bobbie June Griggs original complaint in this action which is reprinted at App. 20.

[3] A copy of which is reprinted at App. 32.

[4] A brief summary of the nature, extent and treatment of Petitioner's mental illness was detailed in the deposition testimony of her psychiatrist, Perry Trouche, relevant portions of which are reprinted at App. 28.

outrage (intentional infliction of emotional distress).[5] Petitioner, Peter Harvey Griggs, brought an action alleging loss of consortium.

In April 1994, after significant discovery had been accomplished, Respondent filed a motion to dismiss both complaints for lack of subject matter jurisdiction on the ground that Petitioners' state claims were preempted by the Copyright Act of 1976 (Act).[6]

On appeal the South Carolina Supreme Court affirmed. The court determined that the recipe was subject to copyright[7] and that the Petitioners' state claims for outrage and negligent infliction of physical injury were preempted reasoning that they stemmed from Respondent's unauthorized publication of the recipe and therefore arose under the Act.[8]

One Justice concurred in part and dissented in part on the ground that Petitioners' claims for outrage and

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[5] Petitioner also alleged state claims for fraud, conversion and quasi contract but argued only the claims for outrage and negligent infliction of physical injury before the state trial court and the South Carolina Supreme Court.

[6] 17 U.S.C. § 101 et seq. (1977).

[7] The Supreme Court relied on *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1923).

[8] The Supreme Court ruled on the state claims of conversion and quasi contract notwithstanding the Petitioners' decision not to brief or argue these claims before it or the state trial court.

loss of consortium did not arise under the Act and were therefore properly before the state trial court.[9]

A timely rehearing petition was denied.

This petition followed.

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the South Carolina Supreme Court wrongly decided that the state claims of negligent infliction of physical injury and outrage (intentional infliction of emotional distress) are preempted by the Act. This resolution of the federal question conflicts with the applicable decisions of the federal courts and denies the Petitioners' redress for the significant personal injuries they have suffered which were neither contemplated by nor protected under the Act. Moreover, in addition to providing much needed guidance to the state and federal courts struggling with this issue, by clarifying the limits of the preemption doctrine the Court will allow future state court plaintiffs, under the appropriate circumstances, the opportunity to avoid removal by pursuing only those state claims which

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[9] The dissent relied on *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 368 S.E.2d 466 (Ct.App. 1988) which cited *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965). The dissenting justice found that these claims arose from the conduct of the Respondent in assuring Petitioner Bobbie June Griggs that it would remove her recipe from its cookbook (which it had included without her permission) and then failing to do so, which in turn caused her to suffer severe emotional distress.

do not arise under the Act. Decision of this issue would also tend to streamline the litigation process by encouraging plaintiffs to focus on the true basis of their claims, i.e., copyright or personal injury, thereby fostering the goal of judicial economy in both the state and federal court systems.

Additionally, granting this Petition will give the Court the opportunity to rectify the erroneous decision of the Eighth Circuit Court of Appeals that a single recipe can be afforded copyright protection under the Act.[10]

1. Preemption of State Claims[11]

Prior to the decision in this case, no state or federal court had ever held that a state tort claim for outrage (intentional infliction of emotional distress) was preempted by the Federal Copyright Act of 1976 (Act).

28 U.S.C. § 1338(a) (1982), vests original and exclusive jurisdiction for any action arising under the Act in the federal district courts. The provisions of 17 U.S.C. § 301(a) (1977) govern whether a claim "arises under" the Act and would therefore preempt a state trial court from exercising jurisdiction. A significant exception is carved

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[10] *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1924).

[11] No cases dealing with negligent infliction of physical injury in the context of preemption under the Act have been found and for purposes of this petition for writ of certiorari Petitioners will, for the sake of brevity, focus primarily on the claim of outrage while not abandoning their position with regards to the former.

out in 17 U.S.C. § 301(b)(3) (1977) for state common law or statutory rights and remedies which "are not equivalent to any of the exclusive rights within the general scope of" the Act.

There are currently two, of what may soon be many, reported federal decisions in which the issue of preemption under the Act has arisen where plaintiffs have alleged state law claims of outrage. Both cases, which were very recently decided and procedurally quite similar, treated the state claim of outrage as being beyond the scope of federal preemption under the Act. *Patrick v. Francis*, 887 F.Supp. 481 (W.D.N.Y. May 17, 1995); *Wharton v. Columbia Pictures Industries, Inc.*, 907 F.Supp. 144 (D.C. MD. Dec. 12, 1995).

In the first of the two cases, *Patrick v. Francis*, 887 F.Supp. 481 (W.D.N.Y. May 17, 1995), a student brought a state court action alleging that another student and several professors had published her research project without authorization. The student alleged state claims for unlawful conversion, unlawful competition, unjust enrichment, state copyright violation, and intentional infliction of emotional distress (outrage). The Defendants removed the action to the federal district court and sought to dismiss the complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Plaintiff sought remand of the action to the state court.

In the most recent decision, *Wharton v. Columbia Pictures Industries, Inc.*, 907 F.Supp. 144 (D.C.MD. Dec. 12, 1995), an author brought a state court action alleging that the Defendant Motion Picture Company had plagiarized his screenplay. The author alleged state claims for misrepresentation, civil conspiracy, unjust enrichment, fraud,

tortious interference with prospective advantage, and intentional infliction of emotional distress (outrage). The Company removed the action to the federal district court and sought to convert the first five state claims into a claim for copyright infringement under the Act and to dismiss the claim for intentional infliction of emotional distress under Rule 12(b)(6) of the Federal Rules of Civil Procedure (failure to state a claim upon which relief can be granted). The Plaintiff sought remand of the action to the state court.

It is significant to note that both courts and apparently all of the litigants considered the claims for intentional infliction of emotional distress to be clearly beyond the scope of federal preemption under the Act. Both courts concluded that the other state claims brought in the cases were preempted by the Act. *Wharton*, 907 F.Supp. at 146 and *Patrick*, 887 F.Supp. at 483. In *Wharton* the court dismissed the claim for intentional infliction of emotional distress after determining that the plaintiff failed to satisfy all of the elements of the cause of action required under Maryland state law. *Wharton*, 907 F.Supp. at 146 and 147. In *Patrick* the court dismissed the claim for intentional infliction of emotional distress on the ground that it lacked jurisdiction since no other federal issues survived in the case. *Patrick*, 887 F.Supp. at 486.[12]

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[12] The Court did not remand the surviving state claim to the New York state court as requested by the plaintiff. Instead, in *dicta* in a footnote, the court opined that the plaintiff would be "hard pressed to state a claim" under the "strict standard" of New York state law. *Id.*

In the present case the majority of the South Carolina Supreme Court relied on *Kakizaki v. Ridel,* 811 F.Supp. 129 (S.D.N.Y. 1992) in determining that the Petitioner Bobbie June Griggs' claim for outrage (intentional infliction of emotional distress) was preempted by the Act. *Kakizaki* did not involve a claim of outrage (intentional infliction of emotional distress). In *Kakizaki* the plaintiff brought an action in the federal district court alleging copyright infringement under the Act and New York state law claims for injury to reputation, misappropriation, conversion and unjust enrichment. All of the claims were based on the allegedly unauthorized publication by the defendant of a photograph the plaintiff had taken. The court granted the defendant's motion for summary judgment on the copyright claim based on a finding that the photograph had been placed in the public domain by the plaintiff.

In addressing the state law claims presented in the action the court noted that "[s]tate causes of action are 'equivalent' to the exclusive rights within the copyright law, and are accordingly preempted by that statute, unless they are 'qualitatively different' from the rights granted under the Copyright Act." (citation omitted) *Id.* at 133. The court concluded that the state claims of injury to reputation, misappropriation and unjust enrichment were preempted by the Act because "all flow from the alleged unauthorized use of the photo by the defendant." *Id.*[13]

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[13] The court stated the "[p]laintiff's conversion claim is simply inappropriate." The court noted that "plaintiff is actually alleging that defendant infringed his copyright in his

Although the court provided only minimal insight into the reasons underlying its decision that the Act preempted the state claims of misappropriation, unjust enrichment, and conversion, the conclusion seems justified given the nature of these claims (i.e., all affecting plaintiff's property rights in the photograph) and the facts of the case.

The difficulty in *Kakizaki* arises in trying to determine how the claim for injury to reputation (defamation) failed to be "qualitatively different from the rights granted under the Copyright Act."[14] The nature of the tort is such that the injury is personal to the plaintiff and does not involve property rights arising from the photograph except insofar as the plaintiff's standing in the community might be deemed a property right. It is unclear from a reading of the case exactly what actions by the defendant the plaintiff alleged had caused the injury to his reputation.[15]

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expression as embodied in the photo" and that "[s]uch an act on defendant's part is covered by the Copyright Act of 1976 and plaintiff's claim is therefore preempted." *Id.*

[14] To establish a valid claim for injury to reputation (defamation) under New York state law it must be "shown [by the plaintiff] that the facts are false and that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner." *Chapadeau v. Utica, Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975).

[15] The factual circumstances in which the claim for injury to reputation (defamation) arose are important in determining whether there is any basis for federal preemption under the Act. For instance, if the initial dispute between the parties (i.e., the alleged unauthorized use of plaintiff's photograph) had

The "leading case" addressing the issue of whether a state claim arises under the Act is *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965). The court determined

> that an action "arises under" the Copyright Act ***if and only if*** the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act, as in *De Sylva*, or, at the very least, and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. (emphasis added) (citations omitted)

T.B. Harms Co., 339 F.2d at 828.

Focusing on the precise language of the rule in *T.B. Harms Co.*, it is apparent that none of the three tests set forth therein have been met by the Respondent in asserting that the preemption doctrine applies to the claims of outrage and negligent infliction of physical injury in this case. First, the remedies sought by the Petitioners are not equivalent to any of the exclusive remedies provided for by the Copyright Act. Under 17 U.S.C. §§ 502-505 (1977), a copyright violation would entitle the aggrieved to injunctive relief (preliminary or permanent) to prohibit

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motivated the defendant to spread vicious rumors that the plaintiff suffered from a loathsome disease (e.g., AIDS) a court would readily find that the state claim for injury to reputation (defamation) was not preempted by the Act. Without more facts the holding in *Kakizaki* as it relates to the state claim of injury to reputation (defamation) is of questionable utility.

the distribution of the protected work; impoundment and destruction of the unauthorized reproductions of the protected work; recovery of the value of the protected work from the defendant; recovery of the lost profits that the plaintiff could have realized from the protected work; statutory damages for the infringement; declaratory judgment as to the true ownership of the protected work; and, attorneys' fees.

In the present case, the Petitioner Bobbie June Griggs seeks damages for the physical injury to her central nervous system and the severe emotional distress she has suffered which were directly and proximately caused by the actions of the Respondent's employees.

Second, under the *T.B. Harms Co.* analysis, construction of the Copyright Act is not necessary to resolve this claim. The principal questions of law, if any, presented by this case relate to the sufficiency of the causes of action for outrage (intentional infliction of emotional distress) and negligence. Resolution of those issues, which were not before the trial court, would necessarily turn on the application and interpretation of purely state law tort principles namely outrage (intentional infliction of emotional distress) and negligence.

Finally, under the *T.B. Harms Co.* analysis, there are no issues in this case which would call into question any "distinctive polic[ies] of the [Copyright] Act [which] ***require***[] that federal principles control the disposition of

the claim." (emphasis added) *T.B. Harms Co.*, 339 F.2d at 828.[16]

Petitioner seeks damages for the Respondent's wrongful conduct which has caused her extreme physical and psychological injury, severe emotional suffering and significant medical expenses. Resolution of this case would have been effected, but for the filing of Respondents' motion to dismiss, without ever consulting the provisions of the Copyright Act. The "big deal" in this case, borrowing the terminology used in a prior decision of the South Carolina Court of Appeals addressing the issue of preemption under the Act,[17] involves general principles of state tort law which will govern the resolution of the dispute between the parties. The Act simply does not address the essence of the principal state claims of outrage (intentional infliction of emotional distress) and negligent infliction of physical injury raised by this action.

The question of the types of actions preempted by the Act has been addressed by a number of scholars in the area of copyright law, most notably, Melville Nimmer in *The Law of Copyright* (1990). Professor Nimmer noted that

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[16] An argument may be made that the very presence of Petitioners' second basis in support of the petition for writ of certiorari (relating to whether a recipe can be copyrighted) shows that a distinctive policy of the Act is being called into question. This argument however overlooks the fact that the case does not require resolution of this issue for the Petitioners to prevail; rather, it represents an alternative basis on which the relief sought herein could be granted.

[17] *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 368 S.E.2d 466 (Ct. App. 1988).

17 U.S.C. § 301(b)(3), as originally drafted, set forth certain examples of rights which were ***NOT*** equivalent to those protected under the Act. Melville Nimmer, *The Law of Copyright* § 1.01[B], at 115 (1990). Those included "breaches of contract, breaches of trust, invasion of privacy, defamation and deceptive trade practices such as passing off, and false representation." *Id.* Although this list of examples of non-preempted types of claims was deleted from the final version of the statute, Nimmer concluded that the intention of Congress was ***NOT*** to make these subject to preemption. Nimmer, *supra* § 1.01[B], at 1-19. Nimmer noted that in each of the listed claims "elements other than, ***or in addition to*** the acts of reproduction, performance, distribution or display are required in order to constitute a violation of such rights." *Id.* at 1-15 (emphasis added). For the breach of contract it is the promise to pay the stated royalty, *id.* at 1-16; for the deceptive trade practices it is the misrepresentation or deception, *id.* at 1-16.1; for the breach of trust it is the requirement of the existence of a trust relationship, *id.* at 1-16.2; for exploitation and disclosure of trade secrets it is the requirement of secrecy. *Id.* Finally, and most significantly, Nimmer observes that the torts of "[i]nvasion of privacy and defamation may sometimes occur by acts of reproduction, distribution, performance or display, ***but the essence of those torts does not lie in such acts.***" ***Id.*** at 1-16.2 to 1-18.1 (emphasis added).

To this list could be added the torts of outrage (intentional infliction of emotional distress) and negligent infliction of physical injury. As noted above, the remedies sought for both state claims differ dramatically from those which would logically be sought in an action for

infringement under the Act. Furthermore, both state claims contain additional elements not set forth in the Act. None of the elements of the tort of outrage (intentional infliction of emotional distress), as defined under South Carolina law, are contained in an infringement action. First, the defendant must have intended that his actions cause severe emotional distress; second, the conduct must be so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; third, the actions must have in fact caused the plaintiff severe emotional distress; and fourth, the emotional distress must have been so severe that no reasonable man could be expected to endure it. *Ford v. Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981). For negligent infliction of physical injury it is the very nature of the harm done to the plaintiff which is neither required by nor protected under a copyright infringement action (i.e., physical injury). *Spaugh v. Atlantic Coast Line R.R.,* 158 S.C. 25, 155 S.E. 145 (1930); *Padgett v. Colonial Wholesale Distributing Co.,* 232 S.C. 593, 103 S.E.2d 265 (1958).

In this case, the publication of Petitioner Bobbie June Griggs' recipe was but one action taken by the Respondent which caused her to suffer emotional distress. It was however, ***NOT*** the action which caused the physical injury to her central nervous system and the severe emotional distress which gave rise to this case. What caused these injuries and gave rise to these claims was her subsequent discovery of Respondent's failure to remove the recipe from the undistributed cookbooks, its deception in telling her that it would do so, and its mailing her "proof" of this statement, a copy of the cookbook from which the recipe had been removed.

Given the impact which its previous unauthorized publication of the recipe had on Petitioner Bobbie June Griggs (and of which it was aware) the Respondent knew or should have known that her discovery of its blatant deception would be physically and emotionally devastating as indeed it proved to be. For these actions Petitioners have the right to redress in the state courts of South Carolina.

2. Copyright of a Single Recipe[18]

Copyright protection does not extend to any idea, procedure or process, "regardless of the form in which it is described, explained, illustrated, or embodied." 17 U.S.C. § 102(b) (1977). The regulations provide as examples of works which will be denied copyright registration "mere listing of ingredients or contents" or "[i]deas, plans, or methods . . . as distinguished from the particular manner in which they are expressed or described in a writing." 37 C.F.R. § 202.1 (1977).

Webster's New Universal Unabridged Dictionary, (Deluxe Second Edition 1983), in pertinent part, defines a recipe as "a list of materials and directions for preparing a dish or drink; a receipt." Given this basic definition the question of whether a recipe can be copyrighted must be answered in the negative.

The value of Petitioner Bobbie June Griggs' recipe to her lay not in the manner in which she expressed her idea for the rice dish but in the idea itself. She did not seek protection under the Act for the actual manner in which

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[18] The argument contained in section 1 assumes that a recipe comes within the subject matter of the Act as required by 17 U.S.C. § 301(b)(1) (1977).

the idea for her recipe was expressed. The essence of the recipe and its importance to her was that it described a list of ingredients and the process and procedures for combining them in order to prepare a particular rice dish. The fact that she reduced this idea for a recipe to writing does not change its status under the Act.

Notwithstanding the clear language of the statute and regulations, there is some old case authority for extending copyright protection to recipes. In *Belford, Clarke & Co. v. Scribner*, 144 U.S. 488 (1892), the Court acknowledged that a 351-page recipe book could be copyrighted and therefore the subject of an infringement action. It is clear that the Act provides copyright protection for a "compilation" (as defined in 17 U.S.C. § 101 (1977) under the provisions of 17 U.S.C. § 103 (1977)) of recipes; notwithstanding the fact that a single recipe would otherwise not be subject to copyright. On this basis *Belford, Clarke & Co.* is distinguishable from the present case.

However, in *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1924), the Eighth Circuit specifically held that individual recipes were subject to copyright. In his treatise, Nimmer expresses doubt as to the validity of this conclusion, noting that "the content of recipes are clearly dictated by functional considerations and therefore may be said to lack the required element of originality, even though the combination of ingredients contained in the recipes may be original in a noncopyright sense." Nimmer, *supra* p.16, § 2.18[I], at 2-220 (referring to § 2.01[B], citing *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113 (S.D.N.Y. 1982); *Consumer Union of United States, Inc. v. Hobart Mfg. Co.*, 199 F. Supp. 860 (S.D.N.Y.

1961); *Tate Co. v. Jiffy Enterprises*, 16 F.R.D. 571 (E.D. Pa. 1954); *Morrissey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); and, *Higgins v. Baker*, 309 F. Supp. 635 (S.D.N.Y. 1970)).

The recipe in this case does not come within the protection afforded by the Act and therefore the issue of preemption should not be reached. But, even if a recipe could be copyrighted, the present case does not "arise under" the Act for the reasons set forth in section 1 above.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bobbie June Griggs, Appellant,

v.

South Carolina Electric & Gas Company, Respondent.

Peter Harvey Griggs, Appellant,

v.

South Carolina Electric & Gas Company, Respondent.

Appeal From Charleston County
James B. Stephen, Judge

Opinion No. 24329
Heard May 31, 1995 – Filed October 16, 1995

AFFIRMED

John P. Bowler, of John P. Bowler & Associates, P.A., of North Charleston, for appellant.

John M. Mahon, Jr., of Columbia, for respondent.

MOORE, A.J.: The circuit court granted respondent's motion to dismiss for lack of subject matter jurisdiction

on the ground the federal Copyright Act[1] (Act) preempts appellants' complaints. We affirm.

FACTS

In 1989, appellant Bobbie June Griggs submitted a recipe in the Third Annual Rice Cook-Off sponsored by respondent South Carolina Electric and Gas Company (SCE&G). Mrs. Griggs was not chosen as a finalist. Her recipe, however, was published with all of the recipes entered in the contest in a cookbook commemorating the event. Mrs. Griggs demanded her recipe be removed from the cookbook as the publication of the recipe prevented her from entering it in future contests. Thereafter, however, some copies of the cookbook containing her recipe were distributed.

In 1992, Mrs. Griggs brought this action alleging the recipe was her sole creation and SCE&G's printing it without her authorization caused her injury. Mrs. Griggs brought several causes of action including conversion, negligence, quasi-contract, and outrage. Mr. Griggs brought an action for loss of consortium. SCE&G made a motion to dismiss for lack of subject matter jurisdiction on the ground that Mr. and Mrs. Griggs' actions were actually actions under the Act which preempts any state claims.

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[1] 17 U.S.C. § 101 et seq. (1977).

ISSUES

1) Did the circuit court err in granting SCE&G's motion to dismiss?

2) Did the trial court err in denying the Griggs' motion to amend their complaints?

DISCUSSION

1) Motion to dismiss

"The [federal] courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a) (1982). The Act preempts state rights that cover works which fall within the Act's subject matter and protect rights which are equivalent to the exclusive rights within the scope of the Act. 17 U.S.C. § 301(a) (1977).

First, we must address whether a single recipe is within the subject matter of the Act.[2] In *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823 (8th Cir. 1923), the court held a recipe is copyrightable. Under *Fargo*, Mrs. Griggs' recipe falls within the subject matter of the Act. "As long as a work fits within one of the general subject matter categories of sections 102 and 103, the [Act] prevents the States from protecting it even if it fails to

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[2] The Griggs' failure to obtain copyright protection under the Act does not allow them to evade preemption. 1 M. Nimmer, *Nimmer on Copyright* § 1.01(B) (1994).

achieve Federal statutory copyright. . . . " 17 U.S.C. § 301 Note (1977). Second, we must determine if the rights sought to be protected are equivalent to those within the general scope of the Act.

Mrs. Griggs alleges conversion, negligence, quasi-contract, and outrage. Generally, "there is no preemption of state law conversion, since the rights are not 'equivalent' to copyright. If, however, contrary to the usual view of conversion, it is regarded as encompassing unauthorized reproduction, then the rights created are indeed 'equivalent' to copyright, and the state law is preempted." *Nobel v. Bangor Hydro-Electric Co.*, 584 A.2d 57 (Me. 1990). *See generally* 1 *Nimmer on Copyright* §§ 1-14(1)-1-14.5. Mrs. Griggs' conversion claim is based upon SCE&G's publication of her recipe without authorization. Therefore, it is preempted. Likewise, as the claim of quasi-contract is based upon the uncompensated and unauthorized publication of the recipe, it is also preempted.

Mrs. Griggs' negligence and outrage claims are based upon SCE&G's failure to advise Mrs. Griggs the recipe would be published and remove the recipe from the cookbook. Again, these claims stem from SCE&G's unauthorized publication of the recipe. Therefore, they are equivalent to copyright rights and preempted. *See Kakizaki v. Ridel*, 811 F.Supp. 129 (S.D.N.Y. 1992). Thus, we hold the Act preempts the Griggs' actions and the circuit court correctly dismissed the complaints.[3]

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[3] The dissent quotes *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 368 S.E.2d 466 (Ct. App. 1988) (citing *T.B. Harms Co. v. Eliscu*, 339

2) Amendment of Complaints

The Griggs contend the circuit court erred in denying their motion to amend their complaints. We disagree. Because it lacked subject matter jurisdiction, the circuit court denied the Griggs' motion. Since we hold the circuit court did not err in dismissing the complaints because the Act preempts them, the circuit court did not have subject matter jurisdiction to allow amendment of the complaints. *See Dockside Assoc. v. Detyens*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988). Accordingly, the order of the circuit court is

AFFIRMED

FINNEY, C.J., TOAL, WALLER, JJ., concur. BURNETT, A.J., concurring in part and dissenting in part in separate opinion.

Burnett, A.J. (Concurring in part and dissenting in part): I respectfully dissent from the holding that the cause of action for intentional infliction of emotional distress (outrage) and the derivative action for loss of

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F.2d 823 (2d Cir. 1964), for the test of whether an action arises under the Act. Judge Sanders in *Maxey*, stated the test from *T.B. Harms* was "a rather convoluted rule" and held "it would appear that the question boils down to whether the aspect of the case which involves the Copyright Act is 'a big deal.' If it is, we are required to 'make a federal case out of it.' " 295 S.C. at 337, 338. (footnotes omitted). Here, the publication of the recipe is "a big deal" in Mrs. Griggs' actions for negligence and outrage and, therefore, they are preempted.

consortium are preempted by the federal Copyright Act (Act).

I agree the Act preempts civil actions which arise under the Act. An action "arises under" the Act "if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, 17 U.S.C. § 101, . . . or asserts a claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim." *Maxey v. R. L. Bryan Co., Inc.*, 295 S.C. 334, 336, 368 S.E.2d 466, 467 (Ct. App. 1988) (citing *T. B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965)).

Mrs. Griggs alleges in her complaint that "[t]he Defendant, through its assurances that it would remove Plaintiff's recipe from its cookbooks coupled with its subsequent . . . failure to do so" inflicted intentional emotional distress upon her. This cause of action arises from the conduct of the Defendant. The majority's conclusion that this cause of action is preempted because it "stems from" the publication significantly modifies the test of *Maxey*.

To recover for outrage, a plaintiff must prove (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct, (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as

atrocious and utterly intolerable in a civilized community, (3) the actions of the defendant caused the plaintiff's emotional distress, and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable person could be expected to endure it. *Ford v. Hutson*, 276 S.C. 157, 276 S.E.d 776 (1981).

The basis of a cause of action for outrage is the conduct of the Defendant. The tangential relationship of this conduct to a publication covered by the Act cannot serve to insulate the Defendant from potential liability.

Applying the *Maxey* test, the outrage cause of action is not for a remedy expressly granted by the Act, does not assert a claim requiring construction of the Act, and does not present a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. This claim simply does not "arise under" the Act.

I would reverse the decision of the trial court to the extent that it dismissed Mrs. Griggs' cause of action for outrage and Mr. Griggs' cause of action for loss of consortium. I express no opinion on the merits of either claim.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF
COUNTY OF CHARLESTON) COMMON PLEAS

Bobbie June Griggs,
Plaintiff,
v.
South Carolina Electric & Gas Company,
Defendant.

C/A No. 92-CP-10-4646

ORDER: DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Peter Harvey Griggs,
Plaintiff,
v.
South Carolina Electric & Gas Company,
Defendant.

C/A No.: 92-CP-10-4645

(Filed Aug. 8, 1994)

Hearing was held on Defendant's 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction, before the undersigned, on June 17, 1994 at the Charleston County Judicial Center. The Plaintiffs were represented by John P. Bowler, Esquire, the Defendant was represented by John M. Mahon, Jr., Esquire. At the close of oral arguments counsel for the parties requested and were granted leave to provide the court additional supportive authority for their respective positions.

Mr. Mahon submitted a proposed order sustaining the Defendant's position at the close of oral arguments. Mr. Bowler provided a proposed order denying Defendant's Motion dated July 1, 1994. Mr. Mahon commented on Mr. Bowler's proposed order by letter on July 7, 1994. On July 15, Mr. Bowler responded to Mr. Mahon's letter, typographical errors in the letter were corrected on July 18, 1994. The Court requested a copy of a regulation that had been misidentified and the matter was cleared up by letter from Mr. Mahon on July 18, 1994. Mr. Mahon forwarded additional supportive authority by letter dated July 21, 1994. All of the above, including the associated cases and other documentation, are made a part of the record in this case.[1]

Upon hearing the arguments of counsel and considering the pleadings, deposition testimony and memorandum submitted by counsel and fully considering the record, it is the opinion of the Court that:

This action arose when Plaintiff Bobbie June Griggs entered the Third Annual Rice Cook-Off in 1989, the Defendant was one of the sponsors of the Cook-Off. The Cook-Off was open to the public. Those entrants that were selected as finalist [sic] were required to actually prepare their recipes at the SCE&G Energy Information Center, located at Citadel Mall. The facts are undisputed that Mrs. Griggs submitted a written recipe that she

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[1] Additionally, the record shall consist of the pleadings and portions of the transcripts of the various deposition [sic] set out in the addendum to this order and any transcript of the oral arguments and documents referred to therein that may be submitted when transcribed.

entitled "June's Creation" to SCE&G for consideration in the Cook-Off. A day or so before the Cook-Off, Mrs. Griggs called to determine if she was a finalist in the Cook-Off. She was advised that she was not a finalist, but that her recipe had been published in a cookbook commemorating the event, and she would be receiving a complimentary copy of the cookbook. Mrs. Griggs was upset that her recipe had been published and demanded that it be removed from the cookbook. Efforts were made to comply with Mrs. Griggs' request; however, it is undisputed that some copies of the cookbook containing Mrs. Griggs' recipe were distributed. Mrs. Griggs filed her lawsuit, along with her husband's loss of consortium action in this Court on October 1, 1992. Considerable discovery has taken place. The basis of the Defendant's Motion is that this is a case that is covered by copyright law that is the exclusive jurisdiction of the federal courts, 28 U.S.C. § 1338(a).

There are several causes of action set out in Mrs. Griggs' Complaint. In paragraphs two and five of the Complaint, which are incorporated by reference in each cause of action, Mrs. Griggs claims that the recipe is her "sole creation", and that "the Defendant printed the Plaintiff's recipe in a cookbook without Plaintiff's authorization." This is the central theme in all five causes of action. It is clear that the unauthorized publication of the recipe is what this case is all about. Numerous portions of Mrs. Griggs' Deposition were cited by the Defendant during oral arguments to bolster this position.

Clearly, Mrs. Griggs claims that her recipe is original. Section 102 of Title 17 U.S.C.A. sets out that copyright protection subsists "in original works of authorship fixed

in any tangible medium." The section goes on to provide that literary works are included as works of authorship. While the term literary works may bring to mind something more than a recipe, the guidance provided by the notes to this section clearly show that novelty, ingenuity or aesthetic merit were not intended to be requirements in qualifying as a literary work.

The Plaintiff's position is that a recipe is a mere listing of ingredients that is not subject to copyright protection. The case of *Fargo Mercantile Co. v. Brechet & Richter Co.*, 295 F. 823, a 1924 North Dakota case, addresses the question of the ability to copyright a recipe. The case points out that a recipe is not a mere listing of ingredients as the Plaintiff proposes, but is an original composition that serves a useful purpose and advances the culinary art. It makes no difference whether it is printed on a single sheet or as a book. The "mere listing of ingredients or contents" exclusion from copyright, provisions of 37 C.F.R. § 202.1(a) (1993) does not apply to recipes as the Plaintiff's claim in this case. The case of *Gray v. Eskimo Pie Corp.*, 244 F. Supp. 785, 788 (D. Del. 1965) sets out that this regulation excludes from copyright factual information that is commonly found on cartons, labels and other packaging that "simply describes the weight and content of" the item. "June's Creation" broken down to it's [sic] mere ingredients: 3 cups of rice, 2 pounds of ground meat, 2 cans of tomato soup, 2 cans of tomatoes, 4 bell peppers, 4 onions and salt and pepper is meaningless. If 100 cooks were given these ingredients they would probably create 100 different dishes. The ingredients are not "June's Creation". The important thing is the rest of the recipe. It is the rest of the recipe,

combined with the factual ingredients, that gives the recipe the originality that entitles it to and requires copyright protection.

Mrs. Grigg's [sic] position is clearly that she was damaged by the unauthorized publication of her recipe. Recovery for copyright infringement is exclusively provided for by the federal copyright law in chapter five of Title 17 U.S.C.A.

All of the allegations in the Complaint are state-law causes of action that are preempted by the federal copyright law. It is obvious that the legal sufficiency and factual basis for these claims will have to be interpreted by the federal court. At this juncture it is abundantly clear that this Court does not have subject matter jurisdiction over this case.

The only remaining question is the timeliness of the Defendant's Motion. Rule 12(h)(3) South Carolina Rules of Civil Procedure answers this question and makes it clear that the question of subject matter jurisdiction can be raised at any time. It also is clear that Mr. Griggs' loss of consortium action is dependant [sic] upon his wife's action and it too must be dismissed. And,

IT IS THEREFORE ORDERED, THAT DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS GRANTED AS TO BOTH CASES AND THEY ARE HEREBY DISMISSED, EACH PARTY TO BEAR THEIR OWN COSTS.

/s/ James B. Stephen
James B. Stephen
Presiding Judge For the Ninth
Judicial Circuit

Spartanburg, South Carolina

August 8, 1994.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C. P. & G. S.

By /s/ Lucy Campbell
DEPUTY CLERK

ADDENDUM

The Defendant submitted page 56, lines 3-5 and 18-23; page 57, lines 9-12; page 93, lines 19-24; page 102, lines 13-24; page 106, lines 2 and 3; and, page 122, lines 9-16, from the deposition of the Plaintiff, Bobbie June Griggs, dated November 10, 1993 and a copy of *The Official Cookbook for "The Third Annual South Carolina Rice Cookoff"*.

The Plaintiff submitted the following pages from her deposition page 49, lines 7-10; page 49, line 16 to page 50, line 2; page 50, lines 5-10 and 21-23; page 51, lines 7-10; page 51, lines 17 – page 53, line 18; page 54, lines 1-11; page 55, lines 2-6; page 56, lines 1-5; page 56, lines 16-24; page 57, lines 3-6, 13-16 and line 23 to page 58, line 13; page 59, lines 12-14; page 62, lines [sic] 24 to page 63, line 3; page 63, lines 16-18 and line 24 to page 64, line 2; page 65, lines [sic] 25 to page 66, line 19; page 68, lines 10-13 and 21-25; page 69, line 5 to page 71, line 25; page 90, line 8 to page 91, line 19; page 101, lines 19-25; page 102, lines

7-13; page 106, lines 12-16; and Exhibit #1; the following pages from the deposition of Elwood Stith: page 26, lines 16-18; page 43, line 10 to page 44, line 7; the following pages from the deposition of Michael R. Koons: page 23, line 1 to page 24, line 5; page 31, lines 3-17; page 53, line 10 to page 54, line 11; page 70, lines 11-22; and, the following pages from the deposition of Perry Trouche, MD: page 11, lines 9-12; page 22, line 7 to page 23, line 6; page 32, lines 6-14; and Plaintiff's complaint.

THE SUPREME COURT OF SOUTH CAROLINA

November 16, 1995

Re: Bobbie June Griggs v. SCE&G

"Petition for Rehearing
is denied.

s/ Ernest A. Finney, Jr. C.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

s/ John H. Waller, Jr. A.A.J.

s/ E.C. Burnette, III A.A.J.

November 16, 1995."

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such a clerk's office.

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or

used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§ 504. Remedies for Infringement: Damages and profits

(a) In General. – Except as otherwise provided by this title, an infringer of copyright is liable for either –

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) Actual Damages and Profits. – The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) Statutory Damages. –

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and

profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $500 or more than $20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court it [sic] its discretion may reduce the award of statutory damages to a sum of not less than 200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a pubic broadcasting entity which or a person who, as a regular part of

the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
BOBBIE JUNE GRIGGS Plaintiff, vs. SOUTH CAROLINA ELECTRIC AND GAS COMPANY, A South Carolina Corporation, Defendant.	CASE NO.: 92-DR-10-4646 COMPLAINT JURY TRIAL DEMAND (Filed Oct. 1, 1992)

The Plaintiff, complaining of the Defendant above-named, would respectfully show this Honorable Court that:

1. The Plaintiff is and at all times herein mentioned was a citizen and resident of the County of Charleston, State of South Carolina.

2. At the time of the occurrence herein mentioned Plaintiff was employed by Titan Of Kentucky and continues to be the sole creator and owner of a rice recipe entitled "June's Creation".

3. The Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of South Carolina, and is a public utility operating an electric light and power plant in the City of Charleston, County of Charleston, State of South Carolina.

4. In September 1989, Plaintiff entered her recipe entitled "June's Creation" in the Defendant's Third Annual South Carolina Rice Cook Off in response to an

advertisement made by the Defendant regarding this contest. The advertisement (a copy of which is attached hereto and incorporated herein by reference) stated that the Defendant sponsored the contest and that by submitting recipes, contestants could win a cash prize and/or a ribbon and that all contestants would be awarded certificates of participation. There was no statement that the recipe would be published in a cookbook compiled by the Defendant.

5. After submitting her recipe for the above mentioned contest the Defendant printed the Plaintiff's recipe in a cookbook without Plaintiff's authorization, permission or consent, express or implied. Plaintiff informed the Defendant's employees agents and servants that she had not authorized the use of her recipe in Defendant's cookbook, and that she wanted no distribution of the cookbooks containing her recipe.

6. On or about November 30, 1989 the Defendant first learned from the Defendant's employees that her recipe "June's Creation", was to be published and distributed in the Defendant's cookbook. That as a direct and proximate result of the Defendant's unauthorized publication of the Plaintiff's recipe the Plaintiff became extremely shocked, disturbed, and emotionally upset and experienced a loss of appetite, sleeplessness, anxiety and depression.

7. The Defendant has unjustly benefitted from its unauthorized and uncompensated use of Plaintiff's recipe in its cookbook.

8. The Defendant failed and refused to stop the publication and/or distribution of its cookbook but told

the Plaintiff that the recipe would be torn out of the remaining cookbooks which had not been distributed.

9. Defendant removed Plaintiff's recipe from one cookbook, and mailed that copy to the Plaintiff. However, contrary to Plaintiff's request and its own assurances, the Defendant did not remove Plaintiff's recipe from all remaining cookbooks. Thereafter, Plaintiff discovered that her recipe had not been removed from Defendant's other cookbooks.

10. That as a direct and proximate result of the Defendant's wilful misrepresentation that it would remove the Plaintiff's recipe from its cookbook and its wilful and intentional failure to do so the Plaintiff has suffered the following:

a) She became further shocked, disturbed, and emotionally upset which greatly aggravated and increased her loss of appetite, sleeplessness, anxiety and depression which was initially brought about by the Defendant's unauthorized and uncompensated use of Plaintiff's recipe.

b) She has and will in the future require psychiatric treatment and counselling to deal with the aforementioned depression.

c) She has and will continue to be distressed over the fact that she will be unable to submit her recipe "June's Creation" in contests whose rules prohibit entries that have been previously published. The Plaintiff had entered cooking contests as a mode of relaxation, and now she continues to be greatly distressed because Defendant's unauthorized use of her recipe severely

limits the number of contests in which she can enter the recipe.

d) Because of Plaintiff's severe emotional distress and the accompanying lack of concentration, Plaintiff was forced to quit her employment with Titan of Kentucky and has and will continue to lose income from such employment.

FIRST CAUSE OF ACTION (CONVERSION)

11. The Plaintiff realleges paragraphs one through ten (inclusive) of her complaint as if completely set forth herein in her first cause of action.

12. The Plaintiff's proprietary rights in her recipe "June's Creation" were converted and/or misappropriated by the Defendant when it used the recipe in its cookbook entitled *3rd Annual South Carolina Rice Cookoff.* Through its unauthorized use of Plaintiff's recipe, the Defendant assumed an ownership interest in Plaintiff's recipe that was never consented to by the Plaintiff.

13. That on information and belief the Plaintiff is entitled to actual and punitive damages occasioned to her by virtue of the Defendant's unauthorized use of the Plaintiff's recipe.

SECOND CAUSE OF ACTION (OUTRAGE)

14. The Plaintiff realleges paragraphs one through thirteen (inclusive) of her complaint as if completely set forth herein in her second cause of action.

15. The Defendant, through its assurances that it would remove Plaintiff's recipe from its cookbooks coupled with its subsequent deliberate, intentional, wilful, wanton and reckless failure to do so, engaged in extreme and outrageous conduct which caused the Plaintiff to suffer embarrassment, humiliation, fear, concern, and severe and extreme mental and emotional distress such that no reasonable woman could be expected to endure it and that such conduct was extreme and outrageous and exceeded all bounds of decency and was atrocious and utterly intolerable in a civilized community.

THIRD CAUSE OF ACTION (NEGLIGENCE)

16. The Plaintiff realleges paragraphs one through fifteen (inclusive) of her complaint as if completely set forth herein in her third cause of action.

17. That as a direct [sic] the Defendant's wilful, wanton, reckless, careless and negligent acts and conduct towards the Plaintiff in:

a) Failing to advise the Plaintiff of its intention to publish her recipe;

b) Failing to remove the Plaintiff's recipe from the undistributed Cookbooks as its employees had indicated that they would do.

All of which were the direct and proximate cause of the injury and damage that the Plaintiff suffered as hereinabove alleged.

FOURTH CAUSE OF ACTION (QUASI-K)

18. The Plaintiff realleges paragraphs one through eighteen [sic] (inclusive) of her complaint as if completely set forth herein in her fourth cause of action.

19. Because the Defendant has not compensated Plaintiff for its unauthorized use of her recipe, the Defendant has unjustly benefitted from the creativity and efforts of the Plaintiff.

20. That the Plaintiff is entitled to receive from the Defendant fair and just compensation for its use of her recipe.

FIFTH CAUSE OF ACTION (FRAUD)

21. The Plaintiff realleges paragraphs one through twenty (inclusive) of her complaint as if completely set forth herein in her fifth cause of action.

22. That the Defendant falsely or recklessly represented to the Plaintiff that her recipe "June's Creation" would be removed from all cookbooks that had not yet been distributed.

23. That the Defendant intended for the Plaintiff to act or rely upon this material representation, and that the Plaintiff in fact did reasonably rely upon the Defendant's representation in believing that the Defendant would remove her recipe as promised to the Plaintiff.

24.

WHEREFORE, Plaintiff prays that the Court issue its Order granting Judgment against the Defendant in the sum of Ninety Five Thousand ($95,000.00) Dollars actual

damages and for punitive damages in an amount deemed reasonable by the Court, for all costs of this action including a reasonable attorneys fee and for such other and further relief as this Honorable Court may deem just and proper.

JOHN P. BOWLER AND
ASSOCIATES, P.A.
ATTORNEYS FOR PLAINTIFF

/s/ John P. Bowler
John P. Bowler, Esquire
7741-B Dorchester Road
North Charleston, SC 29418
(803) 552-9444

North Charleston, SC
Dated: 9/28, 1992

BEST AVAILABLE COPY

Enter The 3rd Annual S.C. Rice Cookoff

Open Division

Anyone can enter by sending a recipe to: SCE&G Energy Info Center
Citadel Mall, Box 760 (T 05), Charleston, SC 29402
Attn: Elwood Stith
Entries must be received by September 8

4-H & Youth Division

Any 4-H member or youth under 19 years of age can enter by sending a recipe to the SCE&G Energy Info Center by September 8

Celebrity Division

Celebrity contestants will be selected by sponsors

Prizes

$100, $50, $25 cash awards and ribbons will be awarded to winners in the Open and 4-H & Youth Divisions

Certificates of participation will be awarded to all contestants

Free admission - Door prizes
Giveaways - Free samples

The Rice Cookoff is sponsored by SCE&G, Clemson Extension Service, S.C. Department of Agriculture, and Citadel Mall

Saturday, October 7, 1989
SCE&G Energy Info Center
Citadel Mall

SCE&G
A SCANA Company

* * *

[p. 11] She had been doing work as a demonostrator [sic] for Oster and she had decreased energy, some increase in irritation, and she was on no medication.

Past psychiatric history, she had never been on antidepressants before or had been hospitalized. She had taken Valium at some point in the past but this had caused excessive sedation and hadn't been a help to her. She appeared depressed.

I diagnosed her as having a major depression, single episode, non-psychotic at the time, and recommended that she be in on antidepressants and start with psychotherapy.

Q What age person is Mrs. Griggs?

A She was 52 in 1990, so 55.

Q Was there any discussion or determination concerning menopause?

A No. Not that I recall.

Q Has there been since that time?

A No. As far as I know there has not been.

Q Okay. I would like to discuss depression for just a minute if I could. Your descriptive terms were major depression. Could you distinguish major depression from any other types of depression that may be commonly defined in your profession?

A Yeah. A major depression is a more severe

* * *

[p. 22] and she continues to have depressed mood even with the medication.

But the other medications didn't help her and she actually felt worse when I tried to get her off of the Asendin and Loxitane. She seems to feel best on that combination.

Q Okay. What are the side effects of Asendin and Loxitane treatment?

A There is only one serious long-term side effect and it's called tardive dyskinesia which is basically a muscle spasm problem involving the muscles of your face. It can be a problem with any antipsychotic medication and with the Asendin in particular. And something that I have discussed with Mrs. Griggs and the longer she takes the medication, the more risk there is of that developing.

So there is always the thought of is there something else that perhaps we could go to that would work just as well as. Unfortunately, at this point there isn't anything else that seems to work as well so we are stuck with just hoping that that doesn't become a problem for her.

Q How do the side effects manifest themselves? You said it had to do with musculature of the face.

A Tardive dyskinesia usually involves [p. 23] involuntary facial movements of the lips, facial muscles, tongue, mouth. They can take a variety of forms. It can look like people are chewing or moving their tongue or puckering, and it becomes an inadvertent habit that they

are unaware of but can be very socially disabling. Fortunately Mrs. Griggs has not developed that.

Q Has not?

A Has not.

Q Okay. So is it my understanding that she does not have any side effects from the Asendin and Loxitane?

A She has no – as far as I am aware of she has no unpleasant or difficult side effects at this time, no. There is just the risk that perhaps at some point she would develop tardive dyskinesia but fortunately has not developed it as of yet.

Q Are you able to predict with any reasonable degree of medical certainty whether or not she will in fact develop these side effects at any time in the future?

A The predictions as to risk of that vary tremendously from studies. I have seen quotes from anywhere from 20 to 80 percent. I know the risk is higher in women and it is higher the older you get and

* * *

[p. 32] Q Would your office records indicate exactly how that was being done?

A Not the ones in front of me but I can get you this information off of our – out of our business office.

Q That will be fine. We will just supplement that when the deposition is over. Dr. Trouche, do you have an opinion based on a reasonable degree of medical certainty as to whether or not what we have been calling

generically the cookbook incident caused the condition that existed at the time you first saw Mrs. Griggs?

A I think it did cause her to have a major depression.

Q Would you have an opinion to a reasonable degree of medical certainty as to whether or not Mrs. Griggs' reaction to the cookbook incident was a reasonable or unreasonable reaction?

A I think her reaction to it was more severe than usual, in my opinion.

Q Okay. Would it be fair to say that it was a reaction that you would not expect a normal – and I know this is a very difficult word, especially in your field perhaps to have –

A Well, I don't think it was – I couldn't

* * *

June Griggs
Charleston, SC

JUNE'S CREATION

Cook 3 cups of rice by one of these methods: Cook the rice in a microwave by placing 1 cup of uncooked rice, 2 cups water, 1/2 teaspoon salt in a large microwave safe mixing bowl, stir and cover with a plate or other microwave safe cover. Microwave on HIGH 20 minutes or cook on top of the stove by adding 1/2 teaspoon salt to 2 cups water, stir and bring to a boil, add 1 cup uncooked rice to the boiling salted water, stir, cover, and simmer about 15 minutes. Both methods will yield 3 cups cooked rice.

3 cups of cooked rice
2 pounds of ground round steak or very lean ground beef
2 (10-3/4 ounce size) cans tomato soup
2 (16 ounce size) cans whole tomatoes
4 large green bell peppers
4 medium sized white onion
Salt and pepper to taste

SAUCE

Roll 2 pounds of ground round steak or very lean ground beef into walnut sized meatballs. Put these meatballs in a large pan and brown on both sides by turning once. Brown in an oven set at 350 F degrees. When meatballs have browned on both sides, remove from pan and drain on paper towels. In Teflon coated or large non-stick fry pan, pour in 2 regular cans (10-3/4 ounce size) of tomato soup. Next, pour in juice drained from 2 regular size cans of whole tomatoes, (16 ounce size) being

careful not to crush the tomatoes as the tomatoes will be used on garnish. Set the whole canned tomatoes aside. Blend tomato soup and tomato juice in the fry pan, add the browned meatballs, salt and pepper to taste, cover and simmer at a low temperature. Wash and remove seeds from 4 large green bell peppers. Cut bell peppers into 1/4 inch wide rings and arrange in fry pan, simmer peppers in covered fry pan while preparing onions to add next. Wash and peel 4 medium sized white onions. Cut onions into 1/4 inch wide rings and add to simmering fry pan mixture. Be sure to simmer this mixture on a low temperature to ensure onions and pepper rings will remain intact. Cover fry pan mixture; when stirring is required, use a plastic spatula and lift onions and peppers with one hand and stir sauce with the other hand. When pepper and onion rings are tender, gently lay the whole drained canned tomatoes on top and heat through by simmering about 2 minutes. On a large platter make a bed of the 3 cups cooked rice with a lower large center indention. Spoon some sauce, meat balls, pepper and onion rings, and arrange the whole tomatoes into the rice bed center indention. Serves 6.

Ms. Griggs writes, "I am very proud of this recipe, I created it myself."

Serving suggestions: "GREAT! with cornbread muffins."

Supreme Court, U.S.
FILED
MAR 22 1996

No. 95-1334

In The

Supreme Court of the United States

October Term, 1995

BOBBIE JUNE GRIGGS,

Petitioner,

vs.

SOUTH CAROLINA ELECTRIC & GAS COMPANY,

Respondent.

PETER HARVEY GRIGGS,

Petitioner,

vs.

SOUTH CAROLINA ELECTRIC & GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the South Carolina Supreme Court correct in affirming the lower court's granting of Respondent's motion to dismiss for lack of subject matter jurisdiction?

RULE 29(6) LISTING OF PARENT OR SUBSIDIARY COMPANIES

SCANA Corporation is the parent company of the Respondent. Respondent has no nonwholly owned subsidiaries.

STATEMENT OF THE CASE

Petitioner, Bobby June Griggs, filed her complaint in the South Carolina Circuit Court setting out causes of action for conversion, outrage, negligence, quasi contract and fraud (*see* Petitioners' Brief for Bobby June Griggs' Complaint). Her husband, Peter Harvey Griggs, filed his derivative action for loss of consortium. All of the actions arose from the alleged unauthorized publication of a recipe (*see* Petitioners' Brief) that Petitioner, Bobby June Griggs, had submitted in the Third Annual South Carolina Rice Cook Off. Respondent was a sponsor of the Cook Off. Respondent filed a motion to dismiss the complaints for lack of subject matter jurisdiction (*see* Petitioners' Brief). The motion was granted and the Petitioners appealed to the South Carolina Supreme Court. The South Carolina Supreme Court affirmed the lower court.

REASONS FOR DENYING THE WRIT

1. This Court need look no further than the preamble to Petitioners' Questions Presented to determine that the one inescapable element of this case is the allegedly unauthorized publication of Petitioner, Bobby June Griggs', recipe. If the recipe had not been published none of the rest of the events that Petitioners seek to forge into causes of action would have occurred.

Was there a duty not to publish Petitioner's recipe without her authorization? What was the source of any such duty? Where does an action lie for the breach of such a duty? This is what these cases are about. The answers are found in the law of copyright. The federal courts have exclusive jurisdiction to hear and determine copyright issues. 17 U.S.C. § 106.

Whether or not a single recipe can be copyrighted is really

not the threshold question as Petitioners suggest in the second question presented. If it were, that too would be a copyright issue that would fall within the exclusive jurisdiction of the federal courts. The question is does copyright law have to be considered or interpreted to determine the issues raised in this case. The answer is clearly yes. This places these cases squarely within the holding in *T.B. Harms Co. v. Eliscu,* 339 F.2d 823 (2nd Cir. 1964), *cert. denied,* 381 U.S. 915, 85 S. Ct. 1534, 14 L. Ed. 2d 435 (1965), where the standards for actions that "arise under" the copyright law under 28 U.S.C. § 1338(a) were established:

> An action "arises under" the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement . . . , or asserts a claim requiring construction of the Act . . . , or at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.

Petitioners would have this Court effectively rule that a question as to whether or not a single recipe can be copyrighted or not should be decided by a state court. . .

2. If this case had been brought in the federal district court the district court could have decided the outrage cause of action under South Carolina law just as the Maryland District Court in the *Wharton* case, cited in Petitioners' brief, decided the intentional infliction of emotional distress claim, under Maryland law.

Whether the outrage cause of action is preempted by the copyright law is not the question. What is undeniable is that the publication had to be wrong if Petitioners are to recover.

Whether or not the publication of the recipe was in violation of the copyright law, is a federal question, that must be decided in the federal court, as the South Carolina Supreme Court and the South Carolina Circuit Court correctly ruled.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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